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Issue date: 22Mar2002

CASE NO.: 2001-LHC-1917
FORMERLY 1999-LHC-3027

OWCP NO.: 08-197676

IN THE MATTER OF:

TIMOTHY W. DODDS

Claimant

V.

MESA PETROLEUM COMPANY

Employer

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH

Carrier

DECISION AND ORDER DENYING SECTION 22 MODIFICATION

This matter is before the undersigned on a motion for modification filed by Employer/Carrier seeking "to render justice under the Act." On April 25, 2001, a supplemental hearing was scheduled for September 25, 2001. The formal hearing was cancelled in lieu of the parties reaching stipulations and submitting additional documentary exhibits. Briefs were submitted by the parties on January 10, 2002.

A. PROCEDURAL HISTORY

Claimant's claim was originally presented before Administrative Law Judge Samuel Smith in Case No. 1995-LHC-978. On June 28, 1996, Judge Smith issued a "Decision and Order Based Upon Stipulations, Awarding Benefits and Attorney Fees." Judge Smith reported his Decision and Order was based upon a stipulated record prepared by the parties. Neither

coverage nor jurisdiction under the Act were raised by the parties as issues in the case. Judge Smith specifically found that "Although coverage under the Act cannot be conferred by stipulation, Littrell v. Oregon Shipbuilding Co., 17 BRBS 84, 88 (1985), the undersigned finds that such coverage is present here." (CX-18, page 5). Judge Smith ordered that Employer shall pay to Claimant temporary total disability compensation from April 26, 1990, and continuing based on the weekly compensation rate of $660.62, the maximum compensation rate under the Act. He further ordered that Employer shall provide Claimant with all reasonable and necessary medical treatment for his neck and back injuries sustained on April 24, 1990. (CX-18, p. 12).

Employer/Carrier did not file an appeal or request for reconsideration of Judge Smith's Decision and Order. Employer/Carrier continued to pay Claimant temporary total disability compensation and medical benefits without issue.

On February 13, 1999, a Section 22 modification request filed by Employer/Carrier in Case No. 1999-LHC-3027 was referred by the District Director to the Office of Administrative Law Judges. The undersigned conducted a formal hearing and issued a Decision and Order on January 24, 2001, which was filed by the District Director on January 29, 2001. The issues raised and resolved were: "Jurisdiction," nature and extent of disability and medical entitlement.

Ten years after his injury, Employer/Carrier contended that Claimant was injured while working on a fixed oil and gas platform in Texas state waters and did not meet the situs and status requirements under the Act. Employer/Carrier failed to offer any maps, charts or other documents to establish the location of the platform in Galveston Block 102 at the time of Claimant's injury or any evidence to establish that Galveston Block 102 was in fact subject to a state lease under the jurisdiction of the Texas Railroad Commission. It was further determined that Employer/Carrier failed to offer the best evidence of the location of the oil platform at the time Claimant's injury, notwithstanding specific questions from the undersigned about their intent to do so. For reasons discussed in the Decision and Order, the undersigned determined Claimant was engaged in maritime employment for Employer and was injured on a covered situs thus establishing coverage under the Act. (D and O, pp. 22-27).

Based on the record evidence, I found and concluded that Claimant was temporarily totally disabled from April 24, 1990, the date of his injury, and continuing, for which Employer/Carrier had consistently paid compensation. Employer/Carrier were also liable for all reasonable and necessary medical expenses, to include Botox injections, implantation of a morphine pump and psychological support.

On February 12 and 13, 2001, Employer/Carrier filed a "Motion For Reconsideration and Alternative Motion For Modification and to Vacate Judgment" with attached memorandum and exhibits. The exhibits included "affidavits" from two witnesses, whose availability before or at the hearing was not explained, offered as the "best evidence to pinpoint the location of the platform on which the claimant was working when the alleged incident occurred" and to establish that Galveston Block 102 is located within the Texas territorial waters. Employer/Carrier contended there is no "subject matter jurisdiction" over this matter and the judgment is void pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure.

On March 15, 2001, Employer/Carrier's motion for reconsideration was denied for reasons set forth in the Order Denying Motion, incorporated herein by reference. However, Employer/Carrier's Motion For Modification "to render justice under the Act," based on the same evidence proffered to support their motion for reconsideration, even though the evidence was clearly and readily available before the hearing which Employer/Carrier elected not to introduce, was considered as a challenge to jurisdictional findings based on a mistake of fact. It was determined that the proffer of evidence, if credited, "could result in a substantial and material change in the outcome of this case." The undersigned concluded that the record should be re-opened to allow further hearing, solely on the issue of the platform location, and consideration of the newly proffered evidence since the authenticity and trustworthiness of the documents were in issue and Claimant had not had an opportunity for cross-examination thereon or presentation of his own rebuttal evidence.

Thereafter, as noted above, the parties submitted additional documentary exhibits in lieu of hearing and supporting briefs.

B. SUMMARY OF THE NEW EVIDENCE

Employer/Carrier submitted ten (10) exhibits in support of its modification on supplemental hearing. In addition to the original exhibits offered at hearing on August 17, 2000, the two affidavits previously noted were also offered. Grid maps/industrial maps were proffered which reflect that Galveston Block 102 is located in the territorial waters of Texas. (EX-6). The Texas State Oil and Gas Lease No. 74450 dated October 5, 1976, for NE/4 of Tract 102-L, Gulf of Mexico, Galveston County was also submitted. (EX-7).

On December 11, 2001, the parties deposed James Gregory Champion, one of the affiants. Mr. Champion is presently Division land manager for South Louisiana and the Gulf of Mexico. (EX-8, p. 4). He was familiar with a production platform located at Galveston Block 102-L which was leased by Employer from the State of Texas. (EX-8, p. 5). Upon examining a grid map of the blocks in the High Island, Galveston and Brazos areas of the Gulf of Mexico, he identified the three-league line demarcating the state territorial waters from the federal waters. (EX-8, pp. 6-7; Exhibit 1 to deposition). He testified that Galveston Block 102 was located within the state territorial waters of Texas. (EX-8, p. 8). On cross-examination, Mr. Champion could not state when oil and gas production began or ended under the State of Texas Lease (EX-7) and had no specific knowledge about the production platform located on the lease. (EX-8, p. 9). He further had no knowledge about when the production platform was constructed, when it was dismantled or whether it was moved to some other location. Id.

On December 11, 2001, the parties also deposed Dennis Sensat, who also provided an affidavit (EX-5). Mr. Sensat has been an employee of Employer for 20 years, a production supervisor for the last four years and for 16 years as a lease operator. (EX-9, pp. 5-6). He testified that he has visited a production platform located at Galveston Block 102-L on four occasions which was situated “at the ship channel, the mouth of the jetties right off of Galveston Island.” (EX-9, p. 6). He also identified Galveston Block 102 as within the three-league line and in state territorial waters on an industry map. (EX-9, p. 7). On cross-examination, Mr. Sensat stated he “first stepped on” the production platform in Galveston Block 102 in 1994-1995, after Claimant’s accident/injury in

1990. He could provide no other information about the location of the platform other than his visit in 1994 and by looking at the industry map. (EX-9, p. 9).

C. DISCUSSION

Employer/Carrier argue (1) "the evidence establishes unequivocally that the alleged incident occurred within the territorial waters of the State of Texas;" (2) that Claimant was not engaged in maritime employment when the incident occurred but was instead an offshore worker on a fixed production platform; (3) that his rights against Employer are governed under the Texas state workers' compensation act; and (4) there is no jurisdiction over Claimant's claims under the Longshore Act. Employer/Carrier again contend there is no "subject matter jurisdiction" over this matter and the judgment is void pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure.

Coverage: Situs and Status

As discussed in the Decision and Order of January 24, 2001, the Section 20(a) presumption was invoked in this matter which is a rebuttable presumption. However, the burden of establishing jurisdiction, or lack thereof, does not lie with the claimant. See Munguia v. Chevron U.S.A. Inc., 999 F.2d 808, 810 n.2, 27 BRBS 103, 104 n.2 (CRT) (5th Cir. 1993). Employer has the burden of proving there is no jurisdiction under the Act. (D and O, p. 22). Moreover, it is undisputed that Employer/Carrier has the burden of proof in sustaining their Section 22 modification request.

Deponents Champion and Sensat have presented no new evidence demonstrating the **actual or specific** location of the production platform on which Claimant was injured **at the time of his injury** in April 1990. Their testimony establishes that Galveston Block 102-L is located within the territorial waters of the State of Texas and that Employer maintained a state lease for **a** production platform within Galveston Block 102-L. There is no evidence that the platform on which Claimant was injured is in fact the platform which was visited by Sensat in 1994-1995. Mr. Champion and Mr. Sensat testified that they had no other knowledge about the platform, such as when it was constructed or dismantled and whether it had been moved to or from any other location. Neither testified that the

production platform on which Claimant was injured was located in state waters at the time of his accident/injury.

Claimant asserts Employer/Carrier have not carried their burden of proof. I agree.

Judge Smith considered the only other evidence of record depicting the location of the production platform which is the LS-202 filed by the Employer/Carrier. (CX-2; here, EX-2). Notwithstanding the entry of "exact place where accident occurred" as "Galveston Block 102L State waters offshore Texas," Judge Smith issued a formal order finding coverage in 1996. Claimant further submits that Employer/Carrier had full participation and an opportunity to be heard before the findings were made in 1996, and therefore "must be presumed to have stipulated to coverage facts at the time, since matters of law such as the sufficiency of the findings were not appealed and are not subject to a Section 22 modification proceeding." Downs v. Director, OWCP, 803 F.2d 193, 198 (5th Cir. 1986).

The proponent of a rule or position has the burden of proof in cases resolved under the Administrative Procedures Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993). I find and conclude, based on the instant record, that Employer/Carrier have not established that Claimant was injured on the territorial waters of the State of Texas, since there is no evidence of the specific location of the platform on which Claimant was working at the time of his accident/injury, and thus have not met their burden of proof under the Act.

Assuming arguendo the record establishes that Claimant was injured on a production platform in the state territorial waters of Texas, which I find it does not, Claimant's injury would have occurred at a situs not covered by the Act. Thus, at the moment of injury Claimant would have been unfortunately working on non-navigable waters within the meaning of the Act. His job task of dismantling the platform is arguably not maritime work. Yet, Claimant spent a greater amount of his work time on navigable waters performing maritime duties than the one week on the platform at which he was injured, thus in this instance, alternatively, he was both on and off navigable waters performing a set of tasks which required him to be momentarily at the situs of injury.

To be covered under the Act, Claimant must meet both the status requirement of Section 2(3) and the situs requirement of Section 3(a). Coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. Stroup v. Bayou Steel Corporation, 32 BRBS 151 (1998). To be considered a covered situs, a site must have a maritime nexus, but it need not be used exclusively or primarily for maritime purposes. See Texports Stevedore Co. v. Winchester, 632 F.2d 504, 12 BRBS 719 (CRT) (5th Cir. 1980)(en banc), cert. denied, 452 U.S. 905 (1981); Gavranovic v. Mobil Mining and Minerals, 33 BRBS 1, 3 (1999). The Fifth Circuit, within which jurisdiction this case arises, has adopted a broad view of the situs test, refusing to restrict the test by fence lines or other boundaries. Id.; See Sisson v. Davis & Sons, Inc., 131 F.3d 555, 31 BRBS 199 (CRT)(5th Cir. 1998). To satisfy the status test, a claimant need only "spend at least some of his time in indisputably longshoring operations." Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 273, 97 S.Ct. 2348, 6 BRBS 150, 165 (CRT)(1977); Boudloche v. Howard Trucking Co., 632 F.2d 1346, 12 BRBS 732 (CRT)(5th Cir. 1980), cert. denied, 452 U.S. 915 (1981); Uresti v. Port Container Industries, Inc., 34 BRBS 215 (2000)(claimant engages in covered employment as long as some portion of his activities constitute covered employment and those activities are more than episodic, momentary or incidental to non-maritime work), recon. denied, 34 BRBS 127 (2000). Thus, the fact that Claimant may have been injured during the course of performing non-maritime work is insufficient in and of itself to deny coverage.

The issues of situs and status were treated in the original Decision and Order at pages 23-27 which addresses Employer/Carrier's arguments renewed in this motion. For the reasons there stated, I find that Claimant has established both situs and status under the Act.

Contrary to Employer/Carrier's argument that subject matter jurisdiction can never be waived, I find that situs and status present questions of coverage, not subject matter jurisdiction, which can be waived by the parties. See Ramos v. Universal Dredging Corporation, 653 F.2d 1353, 1359 (9th Cir. 1981); Perkins v. Marine Terminals Corporation, 673 F.2d 1097, 1100-1101 (9th Cir. 1982). The Fifth Circuit has also distinguished jurisdiction from coverage (status and situs). Munguia, supra, at 810 n.2. Employer/Carrier's reliance on Littrell v. Oregon Shipbuilding Company, 17 BRBS 84 (1985) and

Hall v. Newport News Shipbuilding & Dry Dock Co., 24 BRBS 1 (1990), is misplaced. Neither case stands for the proposition that coverage can never be waived.

In Hite v. Dresser Guiberson Pumping, 22 BRBS 87 (1989), Claimant, a senior pump operator, injured his back while working on a fixed oil platform located within the state territorial waters of Louisiana. The administrative law judge awarded compensation benefits. On appeal, Employer, acknowledging that coverage was not raised as an issue before the judge, contended that claimant was not covered under the Act. The Board noted that at no time did employer address the issue of coverage, nor cross-examine claimant about the situs of his injury, and that coverage was not listed as an issue in the parties' pre-hearing statement. The Board refused to address the issue of coverage since it was not presented before the judge.

Hite and Perkins are analogous to the instant case. Here, as in Hite and Perkins, Employer never raised the issue of situs before Judge Smith nor appealed his determination of coverage to the Benefits Review Board and, by such failure, waived the right to contest coverage on situs grounds. The same conclusion must be reached regarding Employer's failure to raise the issue of status before Judge Smith. I so find and conclude.

Equitable Estoppel

Lastly, in the undersigned's Decision and Order, judicial estoppel was considered in the context of this matter, but rejected in the absence of intent to mislead to gain an unfair advantage. (See D & O, pp. 22-23). Claimant does not take the position that Employer/Carrier are judicially or collaterally estopped from challenging coverage in a Section 22 setting, but argues that equitable estoppel is applicable. In Rambo v. Director, OWCP, 81 F.3d 840, 843 (9th Cir. 1996), vacated on other grounds, 521 U.S. 121 (1997), the Ninth Circuit identified a four-part test for equitable estoppel in Longshore cases: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury.

Claimant submits that all four elements of the test are present here. He argues, assuming his injury occurred in state waters, Employer knew it and acknowledged it when filing its LS-202 after the accident. Secondly, Employer/Carrier must have intended that their stipulation to coverage facts (or alternatively, their assent to coverage findings by Judge Smith) be acted upon, or acted so that Claimant had a right to believe that it was so intended, because an Order was entered based upon the stipulated facts or the coverage stipulation, and benefits have been paid thereunder since 1996. Thirdly, Claimant testified that he was ignorant of the facts regarding the location of the platform on which he was injured, i. e. whether inside or outside state waters. Fourthly, Claimant certainly relied upon Employer/Carrier's conduct to his detriment by not filing or pursuing a state compensation claim.

Claimant further argues that no evidence has been offered to show that a state claim has been filed, reported or pursued and that the statute of limitations may have run on any claim for compensation that might be asserted under the state compensation act. Moreover, there has been no demonstration that equitable tolling is available to Claimant under the Texas state compensation law. Finally, Claimant asserts:

> "[T]here is every possibility that, should compensation benefits be terminated as a result of the [instant] Section 22 action under the Longshore Act, Claimant will have no remedy whatever, under either the federal compensation law or the state compensation law, for the severe ongoing effects of his injuries. No greater harm could come to the claimant than withdrawal of all benefits when he is unable to work and in severe and chronic pain."

If the invocation of equitable estoppel is appropriate in Longshore cases, this case presents a unique scenario for its application since, in agreement with Claimant, I find all four elements of the Rambo test have been met. Employer/Carrier have paid Claimant disability compensation and medical benefits under the Act since 1990 and continue to do so. Employer/Carrier have offered no excuse or justification for waiting ten years, after the entry of a formal order from which they neither sought reconsideration nor appeal and in whose entry they actively participated, to come forward with an attack upon the coverage issue in this matter. Their

initial assault was not even advanced with the best evidence available, which has existed since 1976 and was readily presentable at hearings conducted in 1996 and 2000. Although I have previously concluded that there is no evidence that Employer/Carrier intentionally misled the court on the coverage issue in 1996, I am convinced, in the absence of intent, that error or misjudgment played a significant role in their failure to raise coverage as an issue before Judge Smith.

The record presents nothing which would have precluded Employer/Carrier from raising coverage as an issue in the earlier proceeding before Judge Smith, except perhaps an error in judgment. Parties are not permitted to invoke Section 22 of the Act to correct errors or misjudgments, nor to present a new theory of the case. There must be a balance between the need to render justice under the Act and the need for finality in decision making. See General Dynamics Corporation v. Director, OWCP, 673 F.2d 23, 26 (1st Cir. 1982); McCord v. Cephas, 532 F.2d 1377, 1380-1381 (D.C. Cir. 1976). Such a record reopening here would not serve the orderly administration of justice and would not in this instance "render justice under the Act," certainly not to the Claimant, upon whom it would impose a tremendous injustice. I so find and conclude.

Accordingly, Employer/Carrier's alternative Motion for Modification is hereby **DENIED** for the foregoing reasons and those set forth in the undersigned's original Decision and Order of January 24, 2001 and the Order Denying Motions dated March 15, 2001.

D. ATTORNEY'S FEES

On February 15, 2001, Counsel for Claimant filed a timely Application for Fees for services performed in association with the Decision and Order which issued on January 24, 2001. Counsel is also entitled to file a revised Application for Fees in association with work performed since the issuance of the January 24, 2001 Decision and Order. Such a revised Application for Fees should be filed within 15 days from the date of service of the instant Decision and Order by the District Director. Parties have 15 days following receipt of the revised Application for Fees to file any objections to the

February 15, 2001 Application for Fees and any revised Application for Fees which may be filed. The Act prohibits the charging of a fee in the absence of an approved application.

E. ORDER

Based on the foregoing, Employer/Carrier's alternative Motion for Modification is hereby **DENIED.**

ORDERED this 22d day of March, 2002, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge